Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEE ALMANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 924(c) of Title 18 requires specified mandatory consecutive sentences for committing certain weapons offenses in connection with "any crime of violence or drug trafficking crime," "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

The question presented is whether the "except" clause prohibits imposition of a Section 924(c) sentence if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense for different conduct.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 598 F.3d 238.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 8a-9a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Tennessee, respondent was convicted of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 846, 841(a)(1) and 841(b)(1)(A), and possessing a firearm in furtherance of that drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). The district court sentenced respondent to 15 years in prison, which included a consecutive term of five years on the Section 924(c) conviction, to be followed by five years of supervised release. App., *infra*, 1a-2a & n.1. The court of appeals remanded to the district court for resentencing on the ground that the text of Section 924(c) exempted respondent from any separate sentence for his conviction under that statute. *Id.* at 7a.

1. Section 924(c) of Title 18 makes it unlawful to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, a drug trafficking crime or a crime of violence. See 18 U.S.C. 924(c)(1)(A). The mandatory minimum sentence for that offense is five years of imprisonment, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." *Ibid.* The mandatory prison term must be "in addition to the punishment provided for" the "underlying crime of violence or drug trafficking crime." *Ibid.*; see also 18 U.S.C. 924(c)(1)(D)(ii) (stating that, "[n]otwithstanding any other provision of law * * * no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime

during which the firearm was used, carried, or possessed").

The majority of courts of appeals have held that the statute's prefatory "except" clause means that a defendant convicted of an offense under Section 924(c)(1)(A) must be sentenced to the mandatory minimum term set forth in that provision unless another penalty provision elsewhere in Section 924(c) or "the United States Code[] requires a higher minimum sentence for *that* § 924(c)(1) offense." *United States* v. *Easter*, 553 F.3d 519, 526 (7th Cir. 2009) (per curiam), petition for cert. pending, No. 08-9560 (filed Mar. 26, 2009); *United States* v. *Villa*, 589 F.3d 1334, 1342-1343 (10th Cir. 2009) ("Today we join the majority of those courts and hold that the prefatory clause to § 924(c) refers only to a minimum sentence provided by § 924(c) or any other statutory provision that proscribes the conduct set forth in § 924(c)."") (citing cases), petition for cert. pending, No. 09-1445 (filed May 26, 2010).

The Second Circuit, however, interpreted the "except" clause to mean that a defendant is exempt from any sentence for violating Section 924(c) if the defendant faces a higher mandatory minimum sentence for a different offense "arising from the same criminal transaction or operative set of facts" as the Section 924(c) offense. *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009). Thus, in *United States* v. *Whitley*, 529 F.3d 150, 158 (2d Cir. 2008), the Second Circuit held that a defendant who discharged a firearm during a drug trafficking offense was not subject to a ten-year term of imprisonment under Section 924(c)(1)(A)(iii) because he also faced a 15-year mandatory minimum under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e),

for possessing a firearm after being convicted of three serious drug trafficking crimes or violent felonies. Similarly, in *Williams*, *supra*, the Second Circuit held that a defendant convicted of possessing a firearm in furtherance of a drug trafficking crime was not subject to a five-year term of imprisonment under Section 924(c)(1)(A)(i) because he also faced a ten-year mandatory minimum term of imprisonment under 21 U.S.C. 841(b)(1)(A) for the underlying drug trafficking crime. 558 F.3d at 167-168.

2. Pursuant to a plea agreement, respondent pleaded guilty to one count of conspiring to distribute and to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A), and one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). App., *infra*, 1a. The drug trafficking count carried a ten-year mandatory minimum sentence, see 21 U.S.C. 841(b)(1)(A), and the Section 924(c) count carried a consecutive five-year mandatory minimum, see 18 U.S.C. 924(c)(1)(A).

At sentencing, the district court determined that respondent was subject to a Guidelines range of 120 to 135 months on the drug trafficking count and a mandatory consecutive sentence of five years on the Section 924(c) count. The court imposed a sentence of 180 months in prison, to be followed by five years of supervised release. That sentence consisted of the ten-year mandatory minimum sentence on the drug trafficking count plus the consecutive five-year sentence required by Section 924(c).

3. Respondent appealed his sentence. His counsel sought to withdraw from the case and filed a brief in accordance with *Anders* v. *California*, 386 U.S. 738

(1967), stating he had identified no non-frivolous grounds for appeal. 08-6027 Docket entry (6th Cir. Apr. 16, 2009). Respondent filed a supplemental brief arguing that, under Section 924(c)'s prefatory "except" clause as interpreted by the Second Circuit in *Whitley*, *supra*, he should not have received a consecutive five-year term for the Section 924(c) conviction.

The government argued in a letter brief that respondent had not raised this argument below and that he could not establish plain error entitling him to relief. Respondent's counsel submitted a letter suggesting that the court hold the appeal in abeyance pending disposition of the petition for a writ of certiorari that the United States had recently filed seeking review of the Second Circuit's decision in *Williams*.

4. In a decision dated March 10, 2010, the court of appeals remanded for resentencing. The court concluded that the "decision and reasoning of the Second Circuit [in *Whitley*] are persuasive" and held that "[t]he plain language of [Section 924(c)] forbids a court from sentencing a criminal defendant under both the mandatory minimum sentence found in [Section 924(c)] and another, greater mandatory minimum sentence in any other provision of law." App., *infra*, 4a, 6a. The court accordingly determined that the district court erred in imposing a consecutive five-year term of imprisonment for respondent's Section 924(c) conviction because he also faced a mandatory ten-year term of imprisonment for his conviction on the underlying drug trafficking crime. *Id.* at 6a, 7a.

REASONS FOR GRANTING THE PETITION

On January 25, 2010, this Court granted certiorari in *Abbott* v. *United States*, 130 S. Ct. 1284 (No. 09-479) and

Gould v. *United States*, 130 S. Ct. 1283 (No. 09-7073), to resolve the circuit conflict on the meaning of the "except" clause of Section 924(c). This case presents the same issue as *Abbott* and *Gould*: whether the "except" clause of Section 924(c) exempts a defendant from any sentence for violating that provision when he also faces a greater mandatory minimum sentence on another count of conviction involving different conduct. The defendant in *Gould*, like respondent, faced a mandatory five-year term of imprisonment for violating Section 924(c) and a mandatory minimum of ten years for an underlying drug trafficking offense. See *United States* v. *Gould*, 329 Fed. Appx. 569, 569-570 (5th Cir. July 29, 2009) (unpublished). The court of appeals held that the "except" clause of Section 924(c) did not exempt Gould from the mandatory consecutive five-year prison term for violating that statute. *Ibid*; see *United States* v. *Abbott*, 574 F.3d 203, 206-211 (3d Cir 2009) (holding that "the prefatory clause refers only to alternative minimum sentences for violations of § 924(c)"). In this case, the Sixth Circuit reached the opposite conclusion, agreeing with the Second Circuit's interpretation of Section 924(c). Because the resolution of *Gould* and *Abbott* will govern the disposition of this case, this petition should be held pending the Court's decisions in *Gould* and *Abbott*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Gould* and *Abbott*, and disposed of as appropriate in light of those decisions.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

JUNE 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-6027

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LEE ALMANY, DEFENDANT-APPELLANT

Filed: Mar. 10, 2010

OPINION

Before: MERRITT, MARTIN, and COLE, Circuit Judges.

MERRITT, Circuit Judge.

On March 13, 2008, pursuant to a plea agreement, Lee Almany entered guilty pleas to the following charges: conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(b)(1)(A) ("drug statute"); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) ("firearm statute"); and having assets that were subject to forfeiture. The District Court accepted his plea and sentenced Almany to mandatory minimums of ten years under the drug statute and five years under the firearm statute, with the terms of imprisonment to run consecu-

tively.[1] The question before this panel is whether the plain language of the firearm statute forbids the imposition of its mandatory minimum sentence when a defendant is already subject to another, greater mandatory minimum sentence under any other provision of law.

I. PROCEDURAL HISTORY

Following his plea and sentencing, Almany timely filed a pro se notice of appeal. On appeal, Almany's counsel filed a motion to withdraw as appellate counsel in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). In his motion and accompanying *Anders* brief, Almany's counsel claimed there are no apparent grounds for challenging Almany's conviction and sentence. The government agreed with counsel's finding by letter, but asked if this Court found a non-frivolous issue in its independent review to have the opportunity to brief the issue. On June 3, 2009, Almany himself submitted a pro se brief citing one issue for appeal. Almany raises the Second Circuit case, *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), and claims that his sentence violates the plain language of the firearm statute as explained in the *Whitley* case. Both the government and Almany's counsel have now filed further letter briefs. Both disagree with Almany's position and the *Whitley* case that the consecutive mandatory minimum sentences violate the clear language of § 924(c)(1)(A).

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[1] In addition to his term of imprisonment, Almany was sentenced to five years' supervised release.

II. ANALYSIS

A. Waiver of Right to Appeal

Almany's plea agreement provided that he waive his right to a direct appeal, but the waiver was not discussed in open court when the District Court accepted Almany's guilty plea. Although a defendant in a criminal case may waive the right to appeal, the waiver must be knowing and voluntary. *United States v. Fleming*, 239 F.3d 761, 763-64 (6th Cir. 2005). We review de novo the question of whether a defendant waived his right to appeal his sentence in a valid plea agreement. *United States v. Murdock*, 398 F.3d 491, 496 (6th Cir. 2005). Rule 11 of the Federal Rules of Criminal Procedure requires that the district court determine that the defendant understands the terms of the plea agreement when waiving the right to appeal. Violations of Rule 11 are reviewed for plain error if the defendant did not object before the District Court. *Id.* This Court has held that it is plain error for the District Court to fail to inquire into a defendant's understanding of the appellate waiver provision of his plea agreement, as required by Rule 11(b)(1)(N). *Id.* at 499.

Here, the District Court asked Almany at his rearraignment hearing, "[d]o you also understand that under some circumstances you or the government may have the right to appeal any sentence that I impose?" Almany indicated that he understood. This question does not alert Almany that the plea agreement requires him to waive his right to appeal, nor does it ascertain that Almany understood the appellate waiver provision of the plea agreement. In fact, the Court's comments inform Almany that he *has* the right to appeal. Further, at the

sentencing hearing, the Court explicitly informed Almany that he had a right to appeal his sentence. Therefore, the District Court committed plain error by failing to probe Almany's understanding of the appellate waiver provision of his plea agreement, and therefore, the waiver provision is unenforceable against Almany.

B. Proper Interpretation of 18 U.S.C. § 924(c)(1)(A)

This Court, in its independent review of this case pursuant to *Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988), must determine whether Almany's counsel is incorrect when asserting that there are no legitimate issues for appeal. In his pro se filing, Almany claims that his sentence violates the language of the firearm statute and points to a recent Second Circuit opinion for support. *See Whitley*, 529 F.3d 150. The plain language of the firearm statute forbids a court from sentencing a criminal defendant under both the mandatory minimum sentence found in the firearm statute and another, greater mandatory minimum sentence in any other provision of law. The statute in question reads:

> *Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law*, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the

> punishment provided for such crime of violence or drug trafficking crime-(i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the fire arm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (emphasis added).

Two Sixth Circuit cases have previously mentioned the impact of this statutory language. *See United States v. Baldwin*, 41 Fed. Appx. 713 (6th Cir. 2002); *United States v. Jolivette*, 257 F.3d 581 (6th Cir. 2001). But *Jolivette* and *Baldwin* are not in point or instructive. Both of those cases involved the imposition of a five-year mandatory minimum sentence under the firearm statute in conjunction with another sentence imposed under the Sentencing Guidelines. Hence, neither of the defendants were subject to two mandatory minimum sentences. *See Whitley*, 529 F.3d at 157. ("The defendants in *Jolivette* and *Baldwin* were convicted of violating bank robbery statutes that did not provide any minimum sentences."); *see also* 18 U.S.C. § 2113(a) (providing no mandatory minimum sentence for the crime of armed bank robbery) *and* 18 U.S.C. § 2113(d) (same). Here, Almany was sentenced to both a mandatory minimum of five years for possession of a firearm in furtherance of a drug trafficking crime and a mandatory minimum of ten years for conspiracy to distribute and possession with intent to distribute. Because a guidelines sentence is obviously not the same as a mandatory minimum sentence, any discussion in *Jolivette* and *Baldwin* about the use of a greater mandatory minimum did not apply to those cases and was *obiter dicta*.

As mentioned above, Almany argues that this Court should evaluate his sentencing in light of the Second Circuit's holding that the "except" clause of the firearm statute exempts a criminal defendant from the mandatory minimum if the defendant is subject to another, greater mandatory minimum sentence. *See Whitley*, 529 F.3d 150. The decision and reasoning of the Second Circuit are persuasive. That Court addressed the text, design and purpose of the statute in reaching its decision. *Id.* at 153. The most compelling argument made by the Second Circuit is the literal interpretation of the language of the statute. As that Court noted, "we have repeatedly been instructed to give statutes a literal reading and apply the plain meaning of the words that Congress used." *Whitley*, 529 F.3d at 156 (collecting cases). Reading the firearm statute literally, the Second Circuit held that the statutory language plainly forbade the imposition of the mandatory minimum contained in the firearm statute in conjunction with, another greater mandatory minimum sentence. The Second Circuit's opinion in *Whitley* is the correct interpretation of the firearm statute.

Other Circuits have narrowed the "except" clause to apply only to other firearms statutes. *See United States v. Collins*, 205 Fed. Appx. 196, 198 (5th Cir. 2006); *United States v. Alaniz*, 235 F.3d 386, 389 (8th Cir. 2000). But this interpretation disregards the "by any other provision of law" language in the statute. The language of the firearm statute does not qualify its prohibition against greater mandatory minimums. Instead, the "except" clause encompasses greater mandatory minimum sentences from both the firearm statute and "any other provision of law."

In sum, the District Court erred by sentencing Almany to both a five-year mandatory minimum sentence under the firearm statute and a ten-year mandatory minimum sentence under the drug statute. This case must be remanded for resentencing, and Almany remains subject to the mandatory minimum under the drug statute.

Accordingly, it is so ordered.

APPENDIX B

18 U.S.C. 924(c)(1) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the

person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.